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**ARIZONA CORPORATION COMMISSION**

June 18, 2008

Chairman Kevin J. Martin  
Commissioner Deborah Taylor Tate  
Commissioner Michael Copps  
Commissioner Jonathan Adelstein  
Commissioner Robert McDowell

Federal Communications Commission  
445 12<sup>th</sup> Street, SW – Portals II Building  
Washington, D.C. 20544

**“REDACTED VERSION”**

“Filed Electronically”

Re: Ex Parte Communication in:

*Petition of Qwest for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Denver, Colorado, Minneapolis-St. Paul, Minnesota, Seattle, Washington and Phoenix, Arizona Metropolitan Statistical Areas, WC Docket No. 07-97*

Dear Chairman Martin and Commissioners:

We are writing to urge you to deny Qwest Corporation’s (“Qwest”) pending petition for forbearance<sup>1</sup> from critical provisions of the Communications Act of 1934 (the “Act”), as amended, in the Phoenix MSA. All available information from the *Omaha* market indicates that the grant of forbearance there was premature. We believe the result of granting forbearance prematurely in Phoenix will have devastating consequences for competition. Given the *Omaha*<sup>2</sup> experience, the existing data in the record regarding the Phoenix MSA is insufficient to support grant of the Qwest Petition under the Section 10 criteria.

The Section 10 criteria requires the Commission to forbear from any statutory provision or regulation if it determines that: (1) enforcement of the regulation is not necessary to ensure that the telecommunications carrier’s charges, practices, classifications, or regulations are just, reasonable, and not unjustly or unreasonably discriminatory; (2) enforcement of the regulation is not necessary to protect consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.

<sup>1</sup> *In the Matter of the Petitions of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Denver, Minneapolis-St. Paul, Phoenix, and Seattle Metropolitan Statistical Areas*, WC Docket No. 07-97.

<sup>2</sup> *In the Matter of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order (Rel. December 2, 2005).

Since the FCC’s decision in *Omaha*, much has happened. The FCC now knows from the data available from the Omaha, Nebraska MSA that grant of a similar forbearance request based solely upon the *Omaha* standards and predictive judgments, would be an insufficient basis upon which to grant Qwest’s forbearance request. In a presentation before a meeting on this topic of the National Association of Regulatory Utility Commissioners (“NARUC”) last year, McLeod presented data that in Omaha after forbearance, Qwest’s wholesale prices rose dramatically. Qwest’s DS-0 monthly recurring rates rose 30%; Qwest’s DS-1 non-recurring charges rose 360%; Qwest’s DS-1 monthly recurring charges rose 72% to 120% and Qwest’s DS-3 monthly recurring charges rose by 117% to 178%. In addition, it was stated that only 3% of the office building had multiple “last mile” providers.

The resulting price increases were in stark contrast to the FCC’s “predictive judgments” regarding the impact of granting forbearance from critical provisions of the Act on competition. The FCC had predicted that “Qwest will endeavor to maximize use of its...network, providing services at retail and at wholesale, in order to minimize revenue defections to Cox’s service.”<sup>3</sup> The FCC also predicted that Qwest’s market incentives would prompt it to make its network available, at competitive rates and terms.<sup>4</sup> Finally, it also predicted that most office buildings would have multiple “last mile” providers. But, these predictive judgments did not turn out to be well-founded and the result has been that competition in Omaha has been undermined. We believe use of these same predictive judgments in determining whether to grant forbearance would therefore not be appropriate in the Phoenix, MSA.

Second, since Qwest filed its Petition seeking forbearance in the Phoenix MSA, the FCC has issued at least one decision which bears directly on Qwest’s forbearance petition. The FCC recently rejected a similar petition for forbearance filed by Verizon for the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas.<sup>5</sup> Verizon sought forbearance from many of the same requirements as Qwest in this case. The FCC found that even though Verizon faced intramodal and intermodal competition, many of the intramodal competitors rely on access to Verizon’s last-mile network facilities. We believe this to be true in Qwest’s case in the Phoenix MSA as well. The Commission also found in *Verizon* that the large cable provider’s market share was insufficient to justify forbearance. We believe that is also the case in the Phoenix MSA.

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<sup>3</sup> See *Id.* Note 3 *supra*, at ¶ 81.

<sup>4</sup> *Id.* at ¶ 83.

<sup>5</sup> *In the Matter of Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. Section 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Memorandum Opinion and Order (Rel. December 5, 2007).

**A. Section 251 Loop and Transport Unbundling**

We are particularly concerned with Qwest’s request for forbearance from Section 251 loop and transport requirements. As Qwest’s actions in Omaha demonstrate, a similar grant of partial forbearance from Section 251 loop and transport requirements in the Phoenix MSA would not be appropriate at this time.

In the *Verizon* case, even though in some wire centers Verizon met the 75% threshold with respect to homes passed by cable providers, the FCC still found forbearance inappropriate due to the level of actual competition in those wire centers, and other factors. In the Phoenix MSA residential market, there are [REDACTED] zip codes out of [REDACTED] in Qwest’s service area or [REDACTED] wire centers out of [REDACTED] in the Phoenix MSA where Cox [REDACTED] homes passed threshold; but Qwest still has [REDACTED] of the facilities based residential local exchange market in [REDACTED] zip codes or [REDACTED] wire centers. In addition, the residential wire line local exchange market in the Phoenix MSA can be characterized as a duopoly. The only other alternatives available to customers at this time are wireless services and Voice over Internet Protocol (“VoIP”). The FCC in *Verizon* estimated “cut-the-cord” wireless to be approximately 13%. There is no credible evidence regarding VoIP market shares at this time. Given this data, competitive conditions are not such that the Section 10 forbearance criteria are met. There has been no demonstration of significant competition in the residential local exchange market outside of the Qwest and Cox duopoly, and forbearance will not encourage the development of further competition but is likely to impede it.

With respect to the business market, the FCC should consider the small business market (less than four lines) separately from the residential market. Our analysis shows that there are no wire centers in which Cox or any other CLEC has a significant market share of small business customers.<sup>6</sup> In the medium business market (4 to 100 lines), the result is no better. Our data indicates that Cox’s market share in all wire centers is [REDACTED].<sup>7</sup> With respect to large business line share (over 100 lines) Cox’s market share is [REDACTED] in all wire centers.<sup>8</sup> While there are other CLECs that have a presence in these markets, there is no

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<sup>6</sup> Overall, Cox has only a [REDACTED] market share in the small business market. The other CLECs have only a [REDACTED] market share. The largest small business market share held by Cox in any wire center in the Phoenix MSA is [REDACTED].

<sup>7</sup> In the medium business market, Cox’s overall market share is [REDACTED] while other CLECs are at [REDACTED]. The largest medium business market share held by Cox in any wire center is [REDACTED].

<sup>8</sup> Overall, Cox has a [REDACTED] market share in the large business market, with over [REDACTED] of the market in only one wire center with de minimis lines. Based upon updated data, while other CLECs have a [REDACTED] market share, AT&T alone comprises [REDACTED]. If the enterprise market is evaluated, Cox has less than a [REDACTED] share in every wire center. The Arizona Commission has no data, however, on the extent that AT&T uses its own facilities to serve its customers.

reliable evidence in the record in this proceeding regarding the extent any CLECs other than Cox have deployed their own transport or last-mile facilities for use in serving customers in any of these business market segments. The FCC has indicated that facilities based competition is what is important with respect to this analysis.<sup>9</sup>

The consideration of wholesale alternatives is critical to this analysis. There is no evidence in the record that there are significant alternative sources of wholesale inputs for carriers in the wire centers for which Qwest seeks relief. In addition, certain of the data submitted by Qwest such as fiber maps to demonstrate competitive deployment was similar to the data presented by Verizon which was found to have little probative value by the FCC.<sup>10</sup> In addition, the GeoResults data submitted by Qwest is insufficient in that it does not show the end points of the fiber. The Arizona Commission was also not provided with any data by the CLECs or Qwest on the number of lit buildings served by fiber providers.

We believe that the FCC’s rules in its latest *Triennial Review Remand Order* (“TRRO”) provide a more than sufficient basis for relief at this time. Our Reply Comments note that there are nine wire centers that meet some of the TRRO non-impaired triggers for transport and loops and thus have been designated as non-impaired for certain services. Qwest has pending a filing with the Arizona Commission seeking non-impaired status for an additional eight wire centers for certain services. The Arizona Commission will act on this petition shortly.

## **B. Dominant Carrier Requirements**

The MSA level data collected by our Staff does not support forbearance from Dominant Carrier requirements in the market for any service.<sup>11</sup> Moreover, utilizing MSA level data to determine whether to grant forbearance from Dominant Carrier requirements in the Phoenix MSA in particular, would not be appropriate based upon the data submitted in our Reply Comments. The Commission has indicated that it would use MSA data absent information showing that there were compelling reasons to narrow it. Our Staff’s data shows significant variation in competitive conditions between zip codes and wire centers. Moreover, for mass markets, Cox has [REDACTED] in the small business (less than 4 lines) market.<sup>12</sup> The

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To further place the market shares into context, the medium business market is comprised of approximately [REDACTED] switched access lines and the large business market is comprised of approximately [REDACTED] switched access lines.

<sup>9</sup> See *Verizon* at ¶ 35.

<sup>10</sup> See *Verizon* at ¶ 40.

<sup>11</sup> On an MSA basis, our data shows that Qwest has more than a [REDACTED] overall residential market share, using the Verizon formula. Our data also shows that Cox has more than a [REDACTED] residential market share in only [REDACTED] of the [REDACTED] wirecenters in the Phoenix MSA.

<sup>12</sup> Overall, in the small business market, Cox has only a [REDACTED] market share. The other CLECs have only a [REDACTED] market share.

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data collected on the medium (4 to 100 lines) and large (over 100 lines) business markets does not support forbearance either. Cox’s presence in those markets is [REDACTED].<sup>13</sup> Moreover, the record does not establish to what extent other carriers rely upon Qwest’s facilities or use their own transport or last mile facilities to provide service. Given the dramatic price increases resulting in *Omaha* after partial forbearance was granted in that market, the Commission needs to reexamine the propriety of Dominant Carrier forbearance before it grants future petitions.

The Arizona Commission is pleased to see that in denying forbearance in the recent *Verizon* case, the FCC appears to have refined some its standards based upon the comments received from parties. The FCC also discussed in the *Verizon* case circumstances where it had made a “non-dominant” carrier finding in the past. Those cases demonstrated degrees of competitiveness which are not present in this case. In one, the carrier faced actual or potential competition in the residential market from three carriers, each of which had competing national networks, as well as “dozens of regional facilities-based carriers,” all of which collectively had significant excess capacity available to themselves and “several hundred” smaller wholesale carrier customers that used that capacity to offer competing domestic interstate interexchange services.<sup>14</sup> Qwest itself was recently found to be non-dominant in its provision of interstate telecommunications services in Terry, Montana, where a facilities-based competitor served between 84 and 93% of the access lines.<sup>15</sup> That degree of non-dominance in the Phoenix MSA exists only in [REDACTED] residential zip codes at this point in time, but those [REDACTED] zip codes have a combined line count of approximately [REDACTED].

Further, as discussed in *Verizon*, Qwest’s requested forbearance could have impacts beyond the MSA level. FCC rules require incumbent LECs like Qwest to geographically average their access rates. Forbearance from Dominant Carrier requirements could result in rates in Qwest’s rural exchanges rising. The record does not address the effects of forbearance on Qwest’s rural exchanges and thus it cannot be said that Qwest’s petition meets any of the prongs of the three-part forbearance test.

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<sup>13</sup> Overall, in the medium business market, on an MSA wide basis, Cox has only a [REDACTED] market share. Other CLECs have a [REDACTED] market share. In the large business market, on an MSA wide basis, Cox has only a [REDACTED] market share. Based upon updated data, while other CLECs have a [REDACTED] large business market share, AT&T has [REDACTED] of the CLEC total market share. To put this in further context, MSA wide, the medium business market is comprised of approximately [REDACTED] access lines and the large business market is comprised of approximately [REDACTED] switched access lines.

<sup>14</sup> *In re AT&T’s Corp.’s Motion to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd at 3271 (1995).

<sup>15</sup> See *Petition of Mid-Rivers Telephone Cooperative, Inc. for Order Declaring it to be an Incumbent Local Exchange Carrier in Terry, Montana Pursuant to Section 251(h)(2)*, WC Docket No. 02-78, 212 FCC Rcd 11506.

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**C. Computer III**

Qwest's request for forbearance from *Computer III*<sup>16</sup> requirements should also be rejected. In *Verizon*, the FCC discussed that it adopted the *Computer III* structural and non-structural safeguards to prevent the BOCs from exercising exclusionary market power due to their control over the ubiquitous local telephone network to impede competition in the enhanced services market. As was the case in *Verizon*, "there is scant evidence in the record regarding the requested relief from *Computer III* requirements at all."<sup>17</sup> The FCC should therefore deny this request.

To summarize, we are convinced that if even partial forbearance is granted, as it was in Omaha, Nebraska, competition is likely to suffer significant setbacks in the Phoenix MSA. If you have any questions or we can provide any other assistance to you in this matter, please do not hesitate to call. Any of the undersigned will be happy to speak with you directly about this matter.

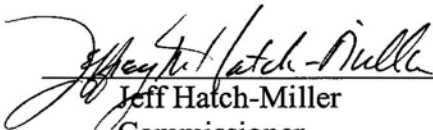
Sincerely,



Mike Gleason  
Chairman  
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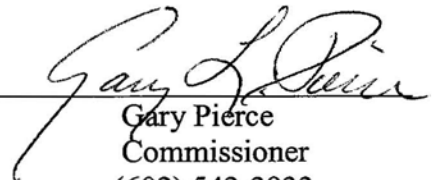
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<sup>16</sup> See Amendment of Section 64.702 of the Commission's Rules and Regulations, CC Docket No. 85-229, Phase I, 104 FCC 2d 958 (1986) et al. ("*Computer III*").

<sup>17</sup> *Verizon* at ¶ 45.